# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 22, 2014 |
| v | No. 279161<br>Kent Circuit Court |
| DENNIS LEE TOMASIK,<br><br>Defendant-Appellant. | LC No. 06-003485-FC |

ON SECOND REMAND

Before: K. F. KELLY, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

This case is before this Court for the third time. In 2007, a jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), for which he was sentenced to concurrent terms of 12 to 50 years in prison. This Court affirmed those convictions in *People v Tomasik*, unpublished opinion per curiam of the Court of Appeals, issued January 26, 2010 (Docket No. 279161) ("*Tomasik I*"). After the Supreme Court vacated this Court's decision and remanded the case to the trial court for further proceedings pursuant to *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994),[1] the case returned to this Court, which again affirmed defendant's convictions. *People v Tomasik (After Remand)*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2011 (Docket No. 279161) ("*Tomasik II*"). The case is now before this Court pursuant to our Supreme Court's order vacating in part this Court's decision in *Tomasik II* and remanding the case for reconsideration of various issued identified by the Supreme Court. *People v Tomasik*, 495 Mich 887; 839 NW2d 194 (2013). We again affirm.

## I. UNDERLYING FACTS AND PROCEEDINGS

This Court's initial opinion in *Tomasik I* sets forth the following pertinent facts:

[1] See *People v Tomasik*, 488 Mich 1053; 794 NW2d 620 (2011).

The victim, T.J., testified that his family lived seven houses down from defendant's house, and that he was a friend of defendant's son, E.T. According to T.J., he played with E.T. inside defendant's house about four times a week. They often played Nintendo in the basement. One day, when T.J. was six years old, defendant called T.J. away from E.T. He led T.J. to E.T.'s bedroom. Defendant closed the bedroom door, and took off his pants and T.J.'s pants. Defendant told T.J. that his penis was like a Popsicle but that T.J. should not bite. Defendant's penis went into T.J.'s mouth, defendant ejaculated, and told T.J. to swallow. Defendant threatened T.J. that he would kill T.J. and his family if T.J. told anybody. T.J. returned to the basement to play with E.T.

T.J. continued to play with E.T. at defendant's house because E.T. was his best friend. According to T.J., defendant continued to sexually abuse him. He remembered one time "really well" where defendant penetrated his anus. After T.J. abandoned a bike ride with his dad to pay with E.T., defendant asked T.J. to come inside with him. In E.T.'s bedroom, defendant took off T.J.'s and his pants. He then flipped T.J., so that T.J.'s face was on the bed, and defendant pushed his penis into T.J.'s anus.

In February 1997, when T.J. was six years old, T.J. saw blood in the toilet and on toilet paper after wiping himself after having a bowel movement. T.J.'s mother took him to the family doctor, Dr. Randall Clark. Clark discovered an anal fissure, and he did not suspect that it was caused by anything other than constipation. However, he testified that, had he known that T.J. was being anally penetrated, his diagnosis would have changed because the fissure was compatible with sexual abuse. Dr. Debra Simms, an expert in child sexual abuse, testified that an anal fissure can be the result of forcible penile entry.

T.J. did not know how often defendant abused him, but testified that it continued during "[t]he whole course of the whole time [he] was hangin' out with E.T." When T.J. was "about eight," he realized that what defendant was doing to him was wrong, and he stopped playing with E.T.

During his freshman year in high school, T.J. was caught stealing money from purses belonging to his school's cheerleaders. T.J. admitted his involvement in the theft, and because the offense was his first offense, he was not prosecuted in juvenile court. He was suspended from school for ten days, ordered to repay the money he stole, and was required to meet with a probation officer. After he received his punishment, T.J. decided that he did not want to "live in a jail cell for the rest of [his] life," so he disclosed the sexual abuse by defendant to his counselor, Julie Schaefer-Space. Schaefer-Space reported the abuse using a "3200 form" to the local sheriff's department.

According to T.J., he was "messed up," "a demon child" before he disclosed the sexual abuse to Schaefer-Space. His mom described him as "very angry, almost hate-filled." T.J. kept weapons, such as knives and bats, in his room, because he was scared that defendant would kill his family. He fondled his

> younger cousin. He often talked of dying, and attempted suicide on several occasions. He used drugs. He often got into trouble at school. At different times, as his parents tried to figure out the cause of his problems, T.J. was asked if he had been sexually abused. T.J. never admitted the abuse to his parents, telling them that he had a secret that he could not tell anyone. According to his parents and Schaefer-Space, after T.J. disclosed the abuse, he became a different person. He was no longer angry. [*Tomasik I* at 1-2.]

Defendant appealed and argued that: (1) the trial court committed plain error by permitting the prosecution to present expert testimony about the characteristics of victims of sexual abuse and sexual offenders; (2) the trial court abused its discretion by denying a defense motion to adjourn the trial; (3) the end date of the offenses set forth in the information should be modified to conform to the evidence presented at trial; (4) trial counsel rendered ineffective assistance; (5) he was denied due process and a fair trial by the introduction of a recording of his police interview which contained inadmissible and highly prejudicial statements; (6) the trial court failed to comply with proper procedures with respect to complainant's school records and psychiatric reports; and (7) appellate counsel rendered ineffective assistance.

This Court entered an order granting defendant's motion to remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), and allowing defendant to move for an in camera review of the victim's counseling records pursuant to *Stanaway*, 446 Mich 643.[2] The trial court denied the motion for an evidentiary hearing, but agreed to conduct an in camera review of T.J.'s counseling records. Subsequently, the trial court affirmed its prior decision denying disclosure of the records to defendant. The trial court also rejected a request by defendant that the court obtain and review additional documents, finding that this request was the type of fishing expedition prohibited by *Stanaway*.

The case returned to this Court following the conclusion of remand proceedings and defendant filed a supplemental brief in which he argued that: (1) trial counsel was ineffective for failing to present a psychological expert; and (2) he was denied due process and a fair trial by the trial court's failure to comply with *Stanaway*. In *Tomasik I*, this Court addressed each issue on the merits, rejected defendant's arguments in each issue, and affirmed defendant's convictions.

Our Supreme Court thereafter vacated this Court's decision in *Tomasik I* and remanded the case to the trial court for further proceedings pursuant to *Stanaway*. *Tomasik*, 488 Mich at 1053. The Supreme Court directed the trial court to disclose additional records to defendant and

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[2] In *Stanaway*, our Supreme Court held that if a defendant can demonstrate a reasonable probability that a victim's privileged counseling records are likely to contain material that is relevant to the defense, the trial court must conduct an in camera review of the records to determine if they do in fact contain such material. The records may be revealed to the defense only if they contain such evidence. *Id.* at 679. The required showing of reasonable probability must be grounded on a demonstrable fact. *Id*. at 677. A mere generalized assertion that counseling records might contain an inconsistent statement by the victim or might lead to exculpatory evidence is insufficient to warrant an in camera review. *Id*. at 680-681.

to permit defendant to move for a new trial. After the trial court disclosed the documents as directed, defendant moved for a new trial, which the trial court denied. This Court subsequently reopened the case and accepted defendant's supplemental brief. In the supplemental brief after remand, defendant argued that he was denied due process and a fair trial because the trial court failed to comply with *Stanaway*.[3]

In *Tomasik II*, this Court rejected defendant's argument that the trial court's failure to comply with *Stanaway* denied him access to material evidence and thus denied him a fair trial. *Tomasik II*, at 4-5. This Court adopted its reasoning in *Tomasik I* to conclude that defendant's remaining issues were without merit, and affirmed defendant's convictions. *Id*. at 5-6.

Our Supreme Court, in lieu of granting leave to appeal, thereafter vacated in part this Court's decision in *Tomasik II* and remanded the case to this Court

> for reconsideration, in light of *People v Musser*, 494 Mich 337 (2013), *People v Kowalski*, 492 Mich 106 (2012), and *People v Grissom*, 492 Mich 296 (2012), of the following issues: (1) whether the Kent Circuit Court erred by admitting the entire recording of the defendant's interrogation; (2) whether the circuit court erred in admitting Thomas Cottrell's expert testimony regarding Child Sexually Abusive Accommodation Syndrome under current MRE 702, and, if so, whether the error was harmless; (3) whether the circuit court erred in denying the defendant's motion for a new trial based on the newly disclosed impeachment evidence of the March 26, 2003 report authored by Timothy Zwart and the March 1, 2003 form completed by Denise Joseph-Enders; and (4) whether the defendant's trial counsel was ineffective by failing to object to the admission of the defendant's entire interrogation, by failing to object to Thomas Cottrell's testimony, and by failing to procure the expert testimony of Jeffrey Kieliszewski to challenge the testimony of Thomas Cottrell. [*Tomasik*, 495 Mich at 887.][4]

## II. ANALYSIS ON REMAND

The Supreme Court first asks us to address whether the trial court erred by admitting the entire recording of defendant's interrogation. The statements made by Detective Martin indicated that Detective Martin knew that defendant was guilty and that she believed T.J. The detective told defendant that she was "not going to lie" to him; that she had "investigated the heck" out of the matter and knew "everything that's gone on"; that she "knew" things had happened between defendant and T.J.; and that there was "no reason why [T.J.] could come up with a conjured up story, about [defendant], I mean, what would he get from that?" In his brief

[3] Defendant relied on his previous briefs with respect to all other issues.

[4] Although the issues we now address on remand have been the subject of prior decisions of this Court, we note that before our Supreme Court's most recent remand order, defendant has not briefed these issues in the context of the precedent indentified by our Supreme Court and neither this Court nor the trial court previously considered these issues in light of those cases.

after remand, defendant asserts that these statements were inadmissible and unduly prejudicial and denied him a fair trial. We disagree.

Defendant did not object at trial to the playing of the recording of his interview with Martin. Accordingly, this Court reviews the issue for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In *Tomasik I*, this Court rejected defendant's assertion that the trial court erred by admitting the unredacted recording into evidence. This Court stated:

> A recording of Martin's February 2006 interview with defendant was played for the jury. On appeal, defendant argues that the admission of numerous statements by Martin on the recording, including that she had "investigated the heck out of the case and knows everything that has gone on" and that she "kn[e]w things happen[ed] when [T.J.] came over to your house years ago," denied him a fair trial. According to defendant, Martin's statements demonstrated Martin's belief that T.J. was credible and that the sexual abuse had occurred. Defendant also argues that the inadmissibility and prejudicial value of Martin's statements were "so obvious" that the prosecutor engaged in misconduct when she played the recording. Finally, defendant argues that, even if Martin's statements were admissible, the trial court should have given the jury "a strong limiting instruction" that the statements were not evidence and could not be considered in determining his guilt.
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> A. Standard of Review
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> Defendant did not object when the prosecutor played the recording of Martin's interview with defendant. We review these unpreserved claims of evidentiary error and prosecutorial misconduct for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.
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> B. Analysis
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> A witness may not express an opinion regarding the guilt or innocence of a defendant. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985); *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). Defendant does not claim that Martin, while testifying at trial, expressed an opinion regarding T.J.'s credibility or defendant's guilt. Rather, he argues that statements Martin made to him during the February 2006 interview, and replayed for the jury, expressed Martin's opinion regarding his guilt. Defendant does not claim that the interview recording, as a whole was inadmissible, but only that certain of Martin's statements were inadmissible. Martin's statements during the interview were not offered at trial for the truth of the matter asserted. In fact, Martin testified that when she told defendant that she had "investigate[d] the heck out of [the] case[]," it was "pretty much a figure of speech." Martin's statements were necessary to provide the full context of defendant's statements. Because the statements were necessary to provide the context of defendant's statements, we reject defendant's

> claim that the probative value of the "unedited" recording of the February 2006 interview was substantially outweighed by the danger of unfair prejudice. MRE 403. Accordingly, defendant has not shown that plain error occurred in the admission of the recording of the February 2006 interview. In addition, because defendant has not shown that the inadmissibility of the "unedited" [recording] of the interview was "so obvious," we reject defendant's claim of prosecutorial misconduct.
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> When evidence is admitted for one purpose but is not admissible for another purpose, a trial court, "upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." MRE 105. However, in the absence of a request or an objection, a trial court is not required to give sua sponte a limiting instruction. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). The only legal authority defendant cites in support of his argument that the trial court erred in failing to sua sponte instruct the jury that Martin's statements were not evidence is *People v Moorer*, 262 Mich App 64; 683 NW2d 736 (2004). The main issue in *Moorer* was whether the trial court erred in admitting various statements of the victim pursuant to MRE 803(3). In explaining the scope of statements admissible under MRE 803(3), the Court stated, quoting 2 McCormick, Evidence (5th ed), that when "'[t]he truth of those assertions may coincide with other issues in the case . . . the normal practice is to admit the statement and direct the jury to consider it only as proof of the state of mind and to disregard it as evidence of the other issues.'" *Id.* at 69. Because the hearsay issue in *Moorer* did not concern whether the trial court, after admitting hearsay pursuant to MRE 803(3), erred in failing to sua sponte give a limiting instruction, we do not find *Moorer* instructive. Accordingly, defendant has not shown that the trial court plainly erred in failing to instruct the jury that Martin's statements to defendant during the February 2006 interview were not evidence. [*Tomasik I*, unpub op at 6-8.]

We now reconsider our previous holding on this issue in light of *Musser*, 494 Mich 337. The defendant in *Musser* was charged with two counts of CSC II and assault and battery, MCL 750.81. The complainant was an 11-year-old girl who alleged that the defendant touched her breasts and inner thighs and put his thumb under the waistband of her pants while she feigned sleep during a family visit to the defendant's residence. *Id*. at 340-341. The complainant did not make her allegations until nearly one year after the incident allegedly occurred. *Id*. at 341-342. The defendant was interviewed by detectives, who informed the defendant at the outset of the interview of the nature of the allegations against him. The defendant admitted that he hugged the complainant and kissed her cheek when he saw her sleeping on the sofa, but denied that he engaged in any activity of a sexual nature. *Id.* at 342. The detectives told the defendant that children, especially children the age of the complainant, did not lie about such matters because they would be embarrassed to talk to strangers about the allegations. The detectives indicated that the child had been interviewed pursuant to forensic protocol and that she was credible. *Id.* at 343-345.

The video of the defendant's interview was played at trial.[5] Before the playing of the video, the detective who interviewed the complainant testified that he followed the forensic interview protocol when he spoke to the complainant, that children the complainant's age knew the difference between the truth and a lie, and that he had conducted "hundreds" of forensic interviews during his career. *Id.* at 345-346. The trial court denied the defendant's motion for a mistrial after the video was played, but gave a limiting instruction that informed the jury that the detectives' questions were not evidence. *Id.* at 346. The jury convicted the defendant of two counts of CSC II and assault and battery. *Id.* at 347.

On appeal, the Supreme Court framed the issue before it as "whether an interrogator's out-of-court statements that vouch for the credibility of another person must be redacted from the recording of the interrogation before it is presented to the jury when the prosecution purports to offer the interrogator's out-of-court statements, *not* for the truth of the matter asserted, but *only* to place the defendant's statement's in context for the jury." *Id.* at 351 (emphasis in original; footnote omitted). The Court declined to adopt a bright-line rule, stating:

> Thus, at this juncture, we hold that where the proponent of the evidence offers an interrogator's out-of-court statements that comment on a person's credibility for the purpose of providing context to a defendant's statements, the interrogator's statements are only admissible to the extent that the proponent of the evidence establishes that the interrogator's statements are relevant to their proferred purpose. See MRE 401. Even if relevant, the interrogator's statements may be excluded under MRE 403 and, upon request, must be restricted to their proper scope under MRE 105. Accordingly, to ensure a defendant's right to a fair trial, trial courts "must vigilantly weed out" otherwise inadmissible statements that are not necessary to accomplish their proffered purpose. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). To hold otherwise would allow interrogations laced with otherwise inadmissible content to be presented to the jury disguised as context. See *id*. [*Musser*, 494 Mich at 354-355.]

The *Musser* Court held that the trial court abused its discretion by admitting all the statements made by the detectives. The Court found that the majority of the statements were irrelevant, and that even if the statements could be deemed to be relevant, their probative value was substantially outweighed by the danger of unfair prejudice to the defendant. Finally, the Court concluded that the error in admitting the evidence required reversal because the statements undermined the reliability of the verdict. *Id.* at 359-363.

This case differs from *Musser* in several respects. Here, defendant was not told why he was being interviewed, whereas in *Musser* the detectives told the defendant at the outset the purpose of the interview. Here, Detective Martin testified that her statement to defendant that she "investigated the heck" out of the case was a "figure of speech" that she used as an

[5] The trial court denied the defendant's pretrial motion to exclude certain statements made by the detectives, holding that the statements placed the incident in context or that the statements were part of the interrogation. *Musser*, 494 Mich at 345.

interviewing technique. Unlike the detective in *Musser*, Martin did not testify that she had received special training in interviewing techniques or that children of the age of the complainant knew the difference between telling the truth and telling a lie.

This issue presents a close question, but we conclude that the trial court did not abuse its discretion by admitting the unredacted interview into evidence. The statements to which defendant objects were made prior to Martin informing defendant why he had been called in for an interview. In fact, after Martin said that she knew that something had happened between defendant and T.J., defendant wondered if he was being accused of "Child molestation or something?" At one point Martin stated that there was no reason that T.J. would make up a story, but at no point did Martin tell defendant that children would not lie about such matters. The objected-to statements provided context for defendant's strong and repeated denials that he had engaged in any improper conduct with T.J. The statements were necessary for context, and thus were not unduly prejudicial. MRE 403; *Tomasik I*, upub op at 7.

Nothing in *Musser* required the trial court to sua sponte give a limiting instruction regarding the use of the unredacted interview. Defendant did not request a limiting instruction. Nevertheless, the jury was instructed that it was to consider how and when defendant's statements were made when determining how much weight to give to those statements. Thus, the jury could take Martin's interviewing tactics into consideration when weighing defendant's statement. We hold that *Musser* does not compel a conclusion that the admission of defendant's unredacted interview at trial constituted plain error.

Next, we are directed to decide whether the trial court erred by admitting the expert testimony of Thomas Cottrell regarding child sexual abuse accommodation syndrome in light of *Kowalski*, 492 Mich 106, and the current version of MRE 702.

Because defendant did not object to Cottrell's testimony at trial, we review the issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

In *Tomasik I*, this Court rejected defendant's assertion that the trial court erred by admitting Thomas Cottrell's testimony. This Court stated:

> Defendant claims that the trial court erred in admitting the expert testimony of Thomas Cottrell regarding the characteristics of victims and offenders of child sexual abuse. We disagree.
>
> A. Standard of Review
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> Defendant did not object to Cottrell's testimony at trial. Accordingly, we review the admission of Cottrell's testimony for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[T]hree requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* Error affects a defendant's substantial rights when it affects the outcome of the lower court proceedings. *Id.*
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> B. Analysis

In *People v Lukity*, 460 Mich 484, 500-501; 596 NW2d 607 (1999), our Supreme Court summarized the general rules of expert testimony concerning child sexual abuse:

In *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), this Court reiterated general principles regarding child sexual abuse expert testimony:

(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty.

It also clarified aspects of such testimony:

(1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. [*Id.* at 352-353.]

The *Peterson* Court specified two situations in which an expert may testify that a victim's behavior was consistent with that of a sexual abuse victim:

Unless a defendant raises the issue of the particular child victim's post-incident behavior *or* attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child. Such testimony would be improper because it comes too close to testifying that the particular child is a victim of sexual abuse. [*Id.* at 373-374 (emphasis added).]

Cottrell, the vice-president of counseling services at the YWCA counseling center, testified that it was "very common" and "a relatively normative pattern" for children to delay in disclosing sexual abuse. He also testified that behavior exhibited by T.J. after the abuse, such as immediately returning to play with E.T. after being abused by defendant, continually returning to defendant's house to play with E.T., performing a sexual act with a younger cousin, and engaging in self-destructive behaviors, i.e., drug abuse and suicide attempts, was behavior consistent with that of a sexually abused child.

In his opening argument, defendant informed the jury that the case involved "a false allegation" by "a desperate young man attempting to get out of trouble." Defendant noted that, immediately before T.J. disclosed the abuse, he was caught stealing money from classmates and heard that defendant had sexually abused J.B., another teenager from the neighborhood, when J.B. was a child. During his cross-examination of T.J., defendant questioned T.J. about his statements that he immediately returned to play, including riding his bike, with E.T. after the abuse, and asked him why he continued to return to defendant's

house to play with E.T. after the abuse started. Defendant also questioned T.J. about his counselors and why he had not disclosed the abuse to his counselors or even to his parents, after his parents specifically asked him if he had been sexually abused. In addition, defendant asked T.J. whether his theft of the cheerleaders' money was not prosecuted in juvenile court because of the disclosure. In light of defendant's attacks on T.J.'s credibility and post-incident behavior, the admission of Cottrell's expert testimony regarding the characteristics of child sexual abuse victims was not plainly erroneous.

Cottrell also briefly testified concerning "offender dynamics." In response to the prosecutor's question whether a "perpetrator would be perpetrating on his own children and all the other children that are coming to the home," Cottrell testified that sexual offenders "carefully select their victims." He explained that an offender's selection of a victim is based on a variety of factors, including whether the offender would like to be sexual with the victim and whether the victim can be influenced not to disclose the abuse. The Supreme Court in *Peterson* did not address the admissibility of expert testimony concerning patterns of behavior by sexual offenders. *People v Ackerman*, 257 Mich App 434, 444; 669 NW2d 818 (2003). However, in *Ackerman*, this Court held that an expert's testimony regarding common practices of sexual offenders was admissible under MRE 702 because the testimony would aid the jury in reaching a verdict. *Id.* at 444-445. The Court explained that "most of our citizen-jurors lack direct knowledge of or experience with the typical forms of conduct engaged in by adults who sexually abuse children." *Id.* at 445. Here, defendant offered the testimony of Harold and Christine Hadden, neighbors of defendant, that they had never observed defendant engage in any inappropriate behavior and that, even after T.J. disclosed the abuse, they have no concern about their two young children going over to defendant's house. J.B., a teenager who lived in defendant's neighborhood, testified that he was E.T.'s best friend, and that defendant never engaged in any inappropriate behavior with him. J.B.'s father testified that he never found defendant's behavior to be unusual. In light of the fact that defendant presented testimony from other neighborhood residents that they never observed defendant engage in any inappropriate behavior, the admission of Cottrell's testimony concerning offender characteristics was not plainly erroneous. [*Tomasik I*, unpub op at 2-4.]

MRE 702 sets out the requirements for the admission of expert testimony:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Kowalski*, the Supreme Court stated:

> [A] court evaluating proposed expert testimony must ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case. Although these considerations are separate and distinct and must each be satisfied independently, they are, in fact, overlapping in nature. [*Kowalski*, 492 Mich at 120-121 (footnote omitted).]

Proposed expert testimony must meet each requirement set out in MRE 702 in order for it to be found to be of assistance to the trier of fact in understanding evidence or determining a fact in issue. *Id*. at 121.

In *Kowalski*, the defendant confessed to killing his brother and his sister-in-law, but later maintained that his confession was false. The defendant sought to call two expert witnesses to testify regarding false confessions. The trial court granted the prosecution's motion to exclude the testimony under MRE 702, finding that the proposed testimony of one expert was unreliable, would not assist the jury, and would be unfairly prejudicial under MRE 403, and that the proposed testimony of the other expert would be misleading and lack context. *Kowalski*, 492 Mich at 115-117. Our Supreme Court observed that other cases had found that expert testimony was necessary to explain "human behavior that is contrary to the average person's commonsense assumptions." *Id.* at 123. The Court cited with approval *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995), which dealt with the use of expert testimony in child sexual abuse cases. The *Peterson* Court held:

> (1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty. However, we . . . now hold that (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child abuse to rebut an attack on the victim's credibility. [*Id*. at 352-353.]

Thus, *Kowalski* and *Peterson* stand for the proposition that expert testimony regarding the behavior of victims of child sexual abuse is the type of testimony that would assist the trier of fact if it met each requirement of MRE 702. *Kowalski*, 492 Mich at 121.

In his brief filed after remand, defendant points to no evidence that would call into question Cottrell's expertise in the field of behavior of victims of child sexual abuse,[6] or whether Cottrell's testimony was based on sufficient facts and data and was the product of reliable principles and methods. Instead, defendant argues that the trial court erred by admitting Cottrell's testimony regarding the characteristics of victims of child sexual abuse. Defendant's

[6] The trial court accepted Cottrell as an expert without objection from defendant.

theory of the case was that T.J. was a troubled child who lied about being sexually abused in an attempt to avoid punishment for other transgressions. *Tomasik I*, unpub op at 4. Cottrell testified that certain behavior that T.J. exhibited after the abuse allegedly occurred was consistent with behavior engaged in by victims of child sexual abuse. Such testimony is admissible under *Peterson*, 450 Mich at 352. Defendant points to no prohibited testimony by Cottrell that sexual abuse occurred, that T.J. was telling the truth, or that defendant was guilty. We find no plain error with respect to Cottrell's testimony.

Next, we reconsider whether the trial court abused its discretion by denying his motion for a new trial based on newly discovered impeachment evidence in light of *Grissom*, 492 Mich 296. Defendant now asserts that the reports provided evidence that T.J. lied so routinely that adults had difficulty determining whether he was telling the truth in any particular instance, and that, because this case was a credibility contest, it is reasonably probable that the verdict would have been different had this evidence been available at the time of trial. We disagree.

We review for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

In *Tomasik II*, this Court rejected defendant's assertion that he was entitled to a new trial on the basis of newly discovered evidence, stating:

> In this case, the records that were not disclosed to defendant during trial are a March 26, 2003 report authored by Zwart, and a March 1, 2003 form authored by Joseph-Enders. The report authored by Zwart indicated that T.J. lied consistently and relished doing so, was quick to blame adults when he got into trouble, and had difficulty with impulse control. It also indicated that T.J. appeared to believe some of his untruthful statements. The form completed by Joseph-Enders indicated that T.J. was deceitful and had had difficulties telling the truth for some time. It is not disputed that the documents not initially disclosed to defendant were favorable to his case. In this case, the trial court denied defendant's motion for a new trial because it determined that even if the documents were to have been disclosed to defendant during trial, the documents were not material because no reasonable probability existed that the result would have been different if the documents were disclosed to defendant during trial. We agree.
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> The evidence presented at trial demonstrated that T.J. was a troubled child who engaged in theft and deceit and had difficulty distinguishing fantasy from reality. Defendant's assertion that the information in the documents was different in kind than the evidence presented at trial is without merit. At trial, defense counsel pointed to evidence that showed that T.J. could not distinguish fantasy from reality, including reminding the jury that T.J. admitted during his testimony that he thought Batman was real, that T.J. lied, and that T.J. previously denied that he was sexually abused and disclosed the abuse only after he was charged with theft.

We conclude that the evidence presented in the documents was cumulative to the evidence presented during the trial. Accordingly, the documents were not material because there is not a reasonable probability of a different result if the documents would have been disclosed to defendant during trial. *Id.* A new trial is generally not required "where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998). The documents contained evidence that T.J. lied; however, during trial, both T.J. and his parents testified that T.J. lied repeatedly. The documents presented evidence that T.J. had difficulty distinguishing fantasy from reality; but at trial T.J. himself acknowledged that he believed that Batman was real. The jury had before it ample evidence that T.J. was a troubled young man who lied, blamed others for his behavior, and could not distinguish fantasy from reality. While the documents reflected poorly on T.J.'s credibility, the evidence presented at trial also provided the jury with reasons to doubt T.J's veracity. The evidence would not have mandated that the jury reject T.J.'s testimony as untruthful, and the issue of credibility is for the jury to decide. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). The evidence in the documents would not have placed this case in such a different light that we must conclude that our confidence in the verdict is undermined because of the absence of the documents. *Fink*, 456 Mich at 454. We conclude defendant was not denied a fair trial in violation of his due process right to exculpatory evidence that is both favorable and material, and accordingly, the trial court did not abuse its discretion when it denied defendant's motion for a new trial. *Stanaway*, 446 Mich at 666. [*Tomasik II*, unpub op at 4-5.]

In *Grissom*, the Supreme Court held:

> We hold that impeachment evidence may be grounds for a new trial if it satisfies the four-part test set forth in *People v Cress*. We further hold that a material, exculpatory connection must exist between the newly discovered evidence and significantly important evidence presented at trial. It may be of a general character and need not contradict specific testimony at trial. Also, the evidence must make a different result probable on retrial. [*Grissom*, 492 Mich at 299-300.]

In *Cress*, our Supreme Court held:

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*Cress*, 468 Mich at 692 (quotation marks and citation omitted).]

On remand, defendant argues that the disclosed reports, which established that T.J. lied on a consistent basis, seemed to believe his lies, and blamed others for his behavior, particularly

adults, would have had a significant impact on the jury's deliberations, and likely would have resulted in a different verdict.

We again conclude that the newly discovered evidence did not support a new trial. *Grissom* establishes that a new trial may be granted on the basis of impeachment evidence. However, in this case, "a material, exculpatory connection [does not] exist between the newly discovered evidence and significantly important evidence presented at trial." See *Grissom*, 492 Mich at 300. This case came down to a credibility contest between defendant and T.J. The reports at issue present additional evidence that T.J. was a habitual liar, but the jury received ample evidence to that effect and still chose to find T.J.'s allegations against defendant credible. We hold that the newly discovered evidence did not entitle defendant to a new trial.

Finally, defendant additionally argues that trial counsel was ineffective for failing to object to the admission of the recording of defendant's entire interrogation and the testimony of Thomas Cottrell, and for failing to procure the expert testimony of Jeffrey Kieliszewski to challenge Cottrell's testimony. We disagree.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate prejudice, defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different, *id*. at 600, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have afforded effective assistance, and defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The court must find the facts, and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. A trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008).

This Court addressed the specific allegations regarding the failure to procure an expert witness and the failure to object to the playing of defendant's interrogation in *Tomasik I*, and found them to be without merit. See *Tomasik I*, unpub op at 8-10 (failure to procure expert witness), 13 (failure to object to the playing of defendant's interrogation). An objection from trial counsel would have been futile. Counsel is not required to make a futile objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Trial counsel did not render ineffective assistance.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra